CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 428

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 4, 1929

CERTIORARI GRANTED NOVEMBER 25, 1929

(34,559)

(34,559)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 428

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, ADMINISTRATORS OF THE ESTATE OF JAMES E. TYLER, PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

	Original	Print
Record from the district court of the United States, district of Maryland	1	1
Caption (omitted in printing)	1	
Petition	1	1
Exhibit "A"—Claim for refund	5	4
Pleas	7	6
Docket entry	8	6
Opinion, Coleman, J.	8	7
Verdict and judgment	22	21
Orders extending time	23	22
Bill of exceptions	24	22
Assignments of error	28	26
Stipulation re transcript of record	30	27
Memorandum re appeal papers	31	28

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 13, 1929

	Original	Print
Order to transmit record	31	28
Clerk's certificate.....(omitted in printing)..	31	
Proceedings in the United States circuit court of appeals, fourth circuit	33	29
Minute entries	33	29
Opinion, Parker, J.	35	30
Judgment	45	36
Minute entries	46	37
Clerk's certificate.....(omitted in printing)..	46	
Order allowing certiorari	47	37

[a-1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MARYLAND, SITTING AS A COURT OF CLAIMS

No. —

JAMES E. TYLER, JR., AND WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant

PETITION TO RECOVER CERTAIN TAXES, ETC.—Filed April 27, 1927

[fol. 2] The petition of James E. Tyler, Jr., and William G. Tyler, Administrators of the Estate of James E. Tyler, deceased, respectfully shows to the Court:

1. That plaintiffs are residents of the State of Maryland and bring this complaint as administrators of the estate of James E. Tyler, deceased, who died a resident of the State of Maryland on or about May 7, 1918.

2. Plaintiffs were duly appointed administrators of the estate of said James E. Tyler, deceased, by the Orphans' Court of Baltimore City on the 23rd day of May 1918, and were at all times since and now the duly qualified and acting administrators of said estate.

3. On or about May 21, 1921 and June 14, 1921, plaintiffs, as said administrators, paid to Joshua W. Miles, the Collector of Internal Revenue for the defendant in the United States Collection District of the State of Maryland, the aggregate sum of $8,949.93 as a Federal estate tax claimed by the defendant and said Collector to be due by plaintiffs as administrators of said estate to defendant as an estate tax under the provisions of the Revenue Act of 1917.

4. Said Joshua W. Miles is not now in office as Collector of Internal Revenue for the collection district of the State of Maryland.

5. At the time of the death of said decedent, James E. Tyler, the decedent and his wife, Ida H. Tyler, were owners as tenants by the entirety of 349 shares of stock of the Kimball-Tyler Company. The value of this stock was not included by plaintiffs in the gross estate of said decedent in their estate tax return filed with said Collector of Internal Revenue. Subsequently, the Commissioner of Internal Revenue determined the value of said 349 shares of stock to be $59,193.42 and included said value in decedent's gross and net estate and a Federal estate tax was paid thereon by plaintiffs as administrators of said estate.

6. On or about September 15, 1924, plaintiffs filed with the Collector of Internal Revenue at Baltimore, Maryland, [fol. 3] a claim for refund of the amount of tax paid defendant by reason of the inclusion in the net estate of said decedent of the value of the stock of the Kimball-Tyler Company as aforesaid. Said claim was based on the contention that property owned by the decedent and his wife as tenants in the entirety was not properly taxable as a part of the decedent's gross estate. A copy of said claim for refund is hereto attached and marked Exhibit A.

7. On or about April 27, 1925, the Commissioner of Internal Revenue, acting for defendant, rejected said claim for refund in full and refused to pay any part thereof to plaintiffs.

8. Plaintiffs say that the action of the Commissioner of Internal Revenue, acting for defendant, in subjecting to the Federal estate tax the value of said shares of stock in the Kimball-Tyler Company owned by the decedent and his wife as tenants in the entirety was erroneous and illegal and his further action in rejecting said claim for refund was erroneous and illegal, in that said shares of stock were not a part of the decedent's gross estate at the time of the decedent's death. But by virtue of the ownership of said stock in the entireties by decedent and his wife, Ida H. Tyler, said Ida H. Tyler was the owner of said stock by right of survivorship at the time of the decedent's death and not by virtue of descent and distribution and was the owner of the part and the whole of said stock prior to the date of the decedent's death.

9. Plaintiffs allege that the action of said Commissioner of Internal Revenue in including the value of said shares of stock in the decedent's gross estate was an attempt to measure the tax imposed on the decedent's gross estate by the value of property owned by another at the time of said decedent's death and accordingly the assessment and collection of said tax was erroneous, illegal and without authority to support it.

10. The tax paid by plaintiffs as the administrators aforesaid and now being withheld by defendant through its officers and agents on the value of the said stock of the [fol. 4] Kimball-Tyler Company is $2,991.87, and the amount of accrued interest which plaintiffs paid to defendant on said $2,991.87 was $365.91.

Wherefore, the premises considered, plaintiffs pray:

1. That process issue requiring defendant to appear and answer this complaint.

2. That judgment be rendered against defendant for the sum of $3,357.78, tax and accrued interest paid by plaintiffs to defendant and wrongfully withheld by defendant from plaintiffs on the value of said stock in the Kimball-Tyler Company, together with interest on said sum in such cases made and provided, and the costs of this suit.

J. Edward Tyer, Jr., Wm. G. Tyler, Administrators of the Estate of James E. Tyler, Deceased. Tyler & England, Frank S. Bright, Lowndes C. Connolly, Attorneys for Plaintiffs.

Duly sworn to by James E. Tyler, Jr., and Wm. G. Tyler. Jurat omitted in printing.

[fol. 5] EXHIBIT "A" FOR PETITION

(Execute separate form for each tax period)

Form 843—Jan., 1922

Treasury Department, Internal Revenue Service

Comptroller General U. S., January 18, 1922

Important

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Collector's Notation

District: ——.
Account Number: ——.
Date received: ——.
Stamp here: —— ——, Collector of Internal Revenue.

Claim for

—Abatement of Tax Assessed

—Credit Against Outstanding Assessments

—Refund of Taxes Illegally Collected

—Refund of Amounts Paid for Stamps Used in Error or Excess

Notice to Collector

Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit: Stamp here: ——.

STATE OF MARYLAND,
City of Baltimore:

Type or print.

(Name of taxpayer or purchaser of stamps:)

James E. Tyler, Jr. and William G. Tyler, Administrators of the Estate of James E. Tyler, deceased, (Residence—

give street and number as well as city or town and State:) 612 Equitable Bldg., Baltimore, Md. (Business address.)

This dependent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

[fol. 6] Period: From ——, Year 19—, to ——, 19—

1. Business in which engaged, Lawyer.
2. Character of assessment or tax: Additional Federal Estate Tax.

(State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased	$6,384 83
4. Reduction of Tax Liability requested (Income and Profits Tax)	$.....
5. Amount to be abated	$.....
6. Amount to be refunded (or such greater amount as is legally refundable)	$4,308 83

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): May 21, & June 14, 1921.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: ——.
9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit	$.....
11. Unpaid assessment against which credit is asked; period from —— to ——	$.....

Dependent verily believes that this application should be allowed for the following reasons:

There was included by the Department in the gross estate of the deceased, and the tax paid thereon by your deponents, the value of 372 shares of the Kimball-Tyler Company. This stock was taxed by the Government as property held by the deceased and his wife as tenants in the

entirety. As shown by a claim for refund heretofore filed by your deponents in this estate, 24 shares of this stock was the property of your affiant, James E. Tyler, Jr., and should not have been taxed in any case. The remaining 348 shares were, as held by the Department, owned by the deceased and his wife as tenants in the entirety. It is submitted that under the decision of the U. S. Court of Claims in Blount v. United States, March 3, 1924, no part of this stock is subject to the estate tax, and the tax paid thereon [fol. 7] should be refunded. Deponents request that, if necessary, they be accorded all rights as to conferences and filing of briefs. A certificate of the court showing that the appointment of deponents *is* in effect is on file with the former claim for refund.

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this — day of ——, 19—. ——, (Title:) ——.

(Signed) James E. Tyler, Jr.

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

c2—11704.

In United States District Court

Pleas—Filed June 8, 1927

The United States of America, by A. W. W. Woodcock, United States Attorney, says for pleas to the declaration in the form of a petition filed against it by the plaintiffs:

1. That it never promised as alleged.
2. That it is not indebted as alleged.

A. W. W. Woodcock, United States Attorney.

[fol. 8] In United States District Court

Docket Entry

June 8, 1927.—"Issues joined".

IN UNITED STATES DISTRICT COURT

LAW. 3240

JAMES E. TYLER, JR., and WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased,

vs.

UNITED STATES OF AMERICA

OPINION—Filed October 19, 1928

COLEMAN, District Judge:

There are two questions presented by this proceeding; (1) whether the value of shares of stock, acquired by a decedent and his wife as tenants by the entireties subsequent to the effective date of the Revenue Act of 1916, is to be included in the gross estate of such decedent for estate tax purposes under the provisions of that Act; and (2) if so, whether such inclusion is constitutional.

The following facts appear from the statement which, by agreement, has been stipulated in the case. James E. Tyler, a resident of Baltimore, Maryland, died there intestate on May 7th, 1918. In due course, a return was made for deferal estate tax purposes and a tax of $2,062.45 was paid upon an estate of $76,561.24. Thereafter, following a review of the return by the Commissioner of Internal Revenue, other items were included in the estate's inventory, increasing the net estate to $207,454.60, upon which an additional tax of $6,384.83 was levied and paid. In this revised inventory, the Commissioner included 349 shares of the Kimball-Tyler Company, a West Virginia corpora-[fol. 9] tion, standing in the names of the deceased and his wife as tenants by the entireties. The stock had previously stood in the name of the deceased alone, but in November 1917, it had been transferred by him as above. The plaintiffs, administrators of Mr. Tyler's estate, now contend that the inclusion of this stock as part of the gross estate of Mr. Tyler and the resulting tax thereon, were improper and that they are, therefore, entitled to a tax refund which, as is stipulated, aggregates $3,337.67 with 6% interest from June 14th, 1921, to the date of judgment. The basis of

plaintiffs' contention is (1) that Congress, by Section 202 (c) of the Revenue Act of September 8, 1916, Chapter 463, (39 Stat. 777), did not intend to tax the interest of a decedent as a tenant by the entireties and (2) that if Congress did so intend, this Section is in violation of the Fifth Amendment and also of Article 1, Section 2, Clause 3 and Section 9, Clause 4 of the Federal Constitution.

The pertinent provisions of the Act are Section 202 (c) above referred to, and Section 201, which read as follows:

"Sec. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentage of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon *the transfer* of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States:

"Sec. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * * * * * *

"(c) To the extent of the interest therein held jointly *or as tenants in the entirety* by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent." (Italics inserted.)

[fol. 10] Considering the first question, namely, is the interest of tenants by the entireties embraced within the language of the foregoing provisions, the Court feels that there is no basis whatsoever on which to argue that it is not. It is true that this peculiar form of tenancy, the characteristics of which are hereinafter fully analyzed, is generally described in the law as one "by the entirety" or "by the entireties," and not "in the entirety," but this is a distinction merely of phraseology and immaterial in the face of the obvious intent of Section 201 and Section 202 (c). The creation of the tenancy does not depend upon the

words employed. Brewer vs. Bowersox, 92 Md. 567; Safe Deposit & Trust Co. vs. Tait, 295 Fed. 429. Furthermore, he word "entirety" or entireties" is unknown in the law, when speaking of tenancies, except in relation to estates held by husband and wife. Thus, to place upon the language of the statute any other meaning than that such a tenancy held by a decedent and his wife was intended to be included, would be to say that Congress is not to be presumed to have used words in the only sense in which they are ever used. It is significant that in the 1924 and 1926 amendments to the Act, the words "any other person" are changed to "spouse,"—in short, a recognition of what has just been said. Where words upon their face are not ambiguous, it is not permissible to seek elsewhere for the will of the legislators. United States vs. Goldenberg, 168 U. S. 95; Caminetti vs. U. S., 242 U. S. 470; Thompson vs. U. S., 246 U. S. 547. It is true that the Court of Claims in Blount vs. U. S., 59 C. Cls. 328, involving a tenancy by the entireties in the District of Columbia, has expressed a very definite doubt as to the correctness of this consruction,—a case where, however, it was not necessary for the Court to decide the question, because the Court found that inasmuch as the tenancy, unlike that in the present case, had been created prior to the effective date of the Revenue Act of 1916, since that Act was not retroactive, the value of such interest should not be included in the gross estate of the decedent. The dictum of the Court on the precise point here at issue is as follows, (page 347):

"* * * We think it doubtful whether subdivision (c) of section 202 contemplates estates by the entirety in [fol. 11] their technical sense. It speaks of an interest held jointly, or as tenant in the entirety by the decedent, 'and any other person.' Only an estate held by the husband and wife could be held by the entirety. It seems to us this language applies to an interest that passes as part of the estate; that is, an estate held jointly or per my et per tout, by the moiety and by the whole."

Although the Blount case was appealed to the Supreme Court, it was dismissed on motion of the Government. (273 U. S. 769). This precise question appears never

to have been before the Courts in any other reported case, but has been before the Board of Tax Appeals, with respect to tenancies by the entireties in Maryland, and also in Missouri, New York and Pennsylvania, and in each instance the dictum of the Blount case was followed. Appeal of Susie M. Root, 5 B. T. A., Report 696; Appeal of James C. Murphy, 5 B. T. A. 952; Appeal of George R. Dyer, 5 B. T. A. 711; and Appeal of Providence Trust Co., 5 B. T. A. 1004.

We now turn to the second contention made by the administrators, namely, that if the Act is to be construed as embracing estates by the entireties, then it is unconstitutional. It is asserted that it is unconstitutional because (1) it is a direct tax upon property in violation of Section 2, Clause 3 and Section 9, Clause 4 of Article 1 of the Federal Constitution, which prohibit any direct tax unless apportioned among the several states according to population; and because (2) it takes property without due process of law in violation of the Fifth Amendment to the Constitution, in that by including tenants by the entireties, the Act provides for measuring the tax upon a decedent's estate by property which belongs to another, namely, to the surviving spouse, and for this reason is arbitrary and capricious. The pertinent provisions of the Act have been quoted in the first part of this opinion.

It is important to note at the outset that this Act of September 8th, 1916, Chapter 463, Title 2, Section 201, et seq. has been before the Supreme Court, and the constitutionality of its fundamental provisions and scheme of taxation upheld, the Court declaring that the estate tax thereby imposed is an indirect tax on the transfer of the net estate of every decedent, and as such does not require apportionment, nor is it an unconstitutional interference [fol. 12] with the right.. the states in regulating descent and distribution. N. Y. Trust Co. vs. Eisner, 256 U. S. 345. In other words, the Court merely affirmed what it had previously announced, that Congress may constitutionally levy excise taxes upon the transmission of property at death. Knowlton vs. Moore, 178 U. S. 41. In the Eisner case, however, the question before the Court involved a construction of the meaning of "charges against the estate" deductible under Section 203 of the Act, and the question now before this Court, namely, the validity of the attempt to include

estates by the entireties in a decedent's gross estate as provided in Section 202 (c), was not involved. Since a statute may be in part constitutional and in part unconstitutional, if the parts are not dependent upon each other, a consideration of this precise question is not precluded by anything which the Supreme Court has said with respect to other aspects of this particular statute. Pollard vs. Farmers Loan & Trust Co., 158 U. S. 601, 635; Llewellyn vs. Frick, 268 U. S. 238, 251, 252.

Taking up the first constitutional objection that is here raised with respect to the inclusion of tenants by the entireties, as part of the gross estate, in computing the tax, namely, that such cannot be done without apportionment because to tax such estates results in a direct tax, the basis of this argument is that property held by the entireties does not pass at death as by inheritance, but rather by survivorship and that, therefore, a tax thereon is a direct tax, in that it is laid upon the ownership of the property and not upon any transfer of rights acquired or passing at death.

In order to meet this argument, it is necessary at the outset to understand the exact nature of a tenancy by the entireties as such an estate is understood by the law of Maryland, for the construction which the Maryland Courts give to such tenancy is binding upon this Court in this proceeding. Clarke vs. Clarke, 178 U. S. 186.

Tenancies by the entireties are firmly established under the law of Maryland. The Maryland Court of Appeals, in the case of Marburg vs. Cole, 49 Md. 402, at 411, thus explains the history of these estates which Maryland inherited as part of the common law of England:

[fol. 13] "By the common law of England, which is the law of this State, except where it has been changed or modified by statute, a conveyance to husband and wife does not constitute them joint tenants, nor are they tenants in common. They are, in the contemplation of the common law, but one person, and hence they take, not by moieties, but the entirety. They are each seized of the entirety, and the survivor takes the whole. As stated by Blackstone, "husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entirety, per tout, et non per my; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole

must remain to the survivor." 2 Blac, Com. 182. This has been the doctrine of the common law from an early period of his history, for we find the principle as stated by Blackstone laid down in Littleton's Tenures, Sec. 291, from whence it has been almost literally transcribed by all subsequent writers on estates. Co. Litt., 187; 2 Cruise Dig., 492; 1 Prest. Est., 131-2 4 Kent's Com., 362; 1 Washb. R. Pro., (4th Ed.) 672, and the authorities there cited."

Again in a later case, the Maryland Court of Appeals explained the peculiar nature of such estates, as follows (page 572, 573):

"It is not because a conveyance or gift is made to husband and wife as joint-tenants that the estate by entireties arises, but it is because a conveyance or gift is made to two persons who are husband and wife; and since in the contemplation of the common law they are but one person, they take and can only take, not by moieties, but the entirety. The marital relation with its common law unity of two persons in one, gives rise to this perculiar estate when a conveyance or gift is made to them without restrictive or qualifying words; and they hold as tenants by the entirety, not because they are declared to so hold, but because they are husband and wife. This estate with its incidents continues in Maryland as it existed at the common law. McCubbin v. Stanford, 85 Md. 390. It differs materially from all other tenancies. The right of survivorship, which is one of its chief incidents, can not be destroyed except by the [fol. 14] joint-act of the two; and upon the death of either the other succeeds to the entire property or fund. 2 Bl. Com., 182; Coke, Litt., 187A; Green v. King, 2 W. Bl. 1211; Hanan v. Towers, 3 Har. & J. 147." Brewer vs. Bowersox, 92 Md. 567, 572, 573.

The common law controlling this character of estate has never been changed in Maryland. This is true in a majority of the States. In others, as in England, it is regarded as abolished by married women's property acts. See Tiffany on Real Property, Vol. 1, Sec. 194, for a compilation of the law in the various jurisdictions. As late as 1918, in the case of Ades vs. Caplin, 132 Md. 66, at 69, we find the Mary-

land Court of Appeals again defining tenants by the entireties as follows:

"Tenants by the entireties are, in the contemplation of the common law, which is the law of this State, but one person, and hence they take, not by moieties, but the entirety. They are each seized of the entirety, and the survivor takes the whole. Marburg vs. Cole, 49 Md. 411."

See also McCubbin vs. Stanford, 85 Md. 378; Baker vs. Baker, 123 Md. 32. In accord with these State decisions, Judge Soper has thus denied a tenancy by the entireties in Safe Deposit & Trust Co. vs. Tait, supra, page 431:

"A tenancy by the entireties is created by a conveyance to husband and wife, whereupon each becomes seized and possessed of the entire state, and after the death of one, the survivor continues to take the whole. No special form of words need be used."

As we have seen, the Act imposes a tax on the transfer of the net estate of every decedent. We must, therefore, determine whether anything has been transferred to the surviving wife by reason of the death of the husband. Has any interest accrued to her which she did not previously have? There are two elements in every transfer of a decedent's estate: (1) exercise of the legal power to transmit at death, and (2) the privilege of succession. Both of these elements may be made the basis of taxation. Stebbins vs. Reilly, 268 U. S. 137. But the Act of 1916, now under consideration, purports to tax only the first of these elements. As was said by Chief Justice White, in Knowlton vs. Moore, supra, page 57:

"Confusion of thought may arise unless it be always [fol. 15] remembered, that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties. The qualification of such taxes as privilege taxes, or describing them as levied on a privilege, may also produce misconception unless the import of these words be accurately understood."

The administrators seek to prove that there has been no transfer from the husband to the wife in the present case

by the analogy of dower, pointing out that a wife's dower interest in her husband's estate has been held not to be subject to an estate tax under the Revenue Act of 1918. (There is no provision relating to dower in the Act of 1916.) Hibbard vs. Crooks, 25 F. (2d) 896; Monroe vs. U. S., 10 F. (2d) 230. In the first of these cases, the property in question was located in Missouri and in the second in Nebraska. In each case, the Court decided that since by the statutes and decisions of the given State, the inchoate right of the surviving spouse became absolute by operation of law, that is, an inchoate right was acquired by virtue of the marriage relation and became consummated on the husband's death, any attempt to tax the value of the interest of the surviving spouse amounted to the imposition of a direct tax and, therefore, was unconstitutional as being in violation of the apportionment provisions of the Federal Constitution. In the Hibbard case, the Court said, page 897:

"It will be observed that the tax imposed is "upon the transfer of the net estate of every decedent." The case entitled In Re: Rogers' Estate, 250 S. W. 576, was decided by the Supreme Court of the state of Missouri April 9, 1923. It was there held that "the wife's interest does not pass to her by will nor by the intestate laws, but it is hers, will or no will. * * * It is a right which she has in her husband's property by virture of the marriage relation." It is an inchoate right, which becomes consummate upon his death.

* * * * * * *

According to the law of Missouri, there existed during the marital relation an inchoate right, and such right became perfect upon the death of the husband. It was, therefore, never the property of the estate of the decedent."

[fol. 16] In the Monroe case, the Court said, page 231:

"By statutes and decisions of Nebraska the interest of the surviving spouse does not come to him through the death, either by inheritance or testamentary succession, nor as distributive share in the estate, but his inc*oh*ate right becomes absolute by operation of law. And this results the same, whether, as in this case, there is a will, which pur-

ports to give him the same identical interest which he would have had without it, or whether he exercises an election to take his sta-utory interest outside the will. In Re Sanford, 91 Neb. 752, 137 N. W. 864, 45 L. R. A. (N. S.) 236; In Re Strahan, 93 Neb. 828, 142 N. W. 678."

Without passing upon, because not before the Court, the precise point decided in the foregoing cases, it is sufficient to say that the law of Maryland with respect to dower is similar to that of the other States referred to. Is the analogy perfect? Are these cases controlling? Of course, the tenancy by the entireties, unlike a wife's inchoate right of dower, was not created by operation of law, but by the act of the parties themselves. There are other distinctions between the two interests. For example, whereas a court of Equity has no jurisdiction, merely at a husband's request, to direct the sale of his property, free from the wife's inchoate dower, such an interest, though capable of release, not being susceptible of sale or transfer or of being divested except with the wife's consent, nevertheless, a decree may in the discretion of the Court, sometimes be passed for the sale of property owned by the husband and wife as tenants by the entirety, even though one of them may oppose the sale. Roth vs. Roth, 144 Md. 553; Masterman vs. Masterman, 129 Md. 167. But fundamentally, in so far as the estate tax is applicable, are the two estates distinguishable on principle? We have described the peculiar nature of a tenancy by the entireties. Under it both the husband and wife are said to hold the entire title. When one dies, therefore, no new estate can be said to be conferred upon the survivor for the death simply destroys the possibility of the decedent's survivorship. The survivor takes nothing which he or she did not have before; acquires no new title but takes the whole by the original conveyance by which he [fol. 17] or she was invested with the entire estate. This is the reasoning adopted in the case of Blount vs. U. S., supra, which the administrators have stressed in support of their contentions and from which it seems pertinent here to quote as follows (pages 346, 347):

"If the estate of the husband and wife was tenancy by the entirety with all the incidents of such an estate at common law, then nothing was transferred to the wife by

the husband's will or by her mere survivorship because she took the entire estate under the original grant. See Palmer v. Mansfield, 222 Mass. 263; Matter of Lyon, 233 N. Y. 208; Brihl v. Martin, 263 Pa. 519. It was said in Hunt v. Blackburn, 128 U. S. 464, 469: "Undoubtedly, at common law, husband and wife did not take under a conveyance to them of land jointly, as tenants in common or as joint tenants, but each became seized of the entirety per tout et non per my—the consequence of which was that neither could dispose of any part without the assent of the other, but the whole remained to the survivor under the original grant." In express terms the tax is imposed by Section 201 upon "the transfer of the net estate of every decedent." See Woodward case, 256 U. S. 632. It is an estate tax, imposed not upon the gross estate but upon the net estate transferred, and rules for the ascertainment of the amount of this net estate are prescribed. See Woodward case, 56 C. Cls. 133, 150. In view of the plain language of the statute we need not consider the refinements as to "death duties" suggested by the Government's contention. In a late case it is said that what this law taxes is not the interest to which legatees or devisees succeeded on death, but the interest of the decedent which ceased by reason of his death. See Y. M. C. A. v. Davis, 264 U. S. 47. But this does not mean that the tax is upon an estate which ceases by reason of the death. It would hardly be contended that this statute imposes a tax on an estate for life held by one at the time of his death on the theory that the tax is upon an interest which ceases by reason of the death. It was said by Mr. Justice White, in Knowlton v. Moore, 178 U. S. 41, 57: "Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of prop- [fol. 18] erty by death which is the subject levied upon by all death duties." The tax here is upon the transfer of an estate which passes from the decedent, and is not upon an estate which ceases with his death. See Knowlton v. Moore, supra; Lederer v. Northern Trust Co., 262 Fed. 52, 54; New York Trust Co. v. Eisner, 256 U. S. 345; Woodward case, supra. It follows that the tax should not be assessed against the estate of tenants by the entirety be-

cause the wife did not take as upon a transfer from the husband at his death, but took under the original grant, his estate ceasing."

The Government in its reply brief admits that in the case of a tenancy by the entireties, there is no actual transfer upon the death of either spouse since each owned the whole, but seeks to qualify and explain this admission by saying "it is equally true that in effect there accrued to the widow upon the decedent's death something which she did not have in his life time, namely, the unrestricted right to dispose of the whole property and give a good title thereto. The assignment which created the estate did not complete the transfer of the property. Subsequent events determined the respective interests therein. * * * In the instant case that which fixed the wife's right was the husband's death,—death completed the transfer. So that it is true, only in a highly technical sense, that nothing passed to the wife on the husband's death. The transfer thus completed by death is in the nature of a testamentary disposition. The purpose of creating an estate by the entirety is to secure the right of survivorship. That is, to direct the devolution of property at death. Therefore, when a person purchases property with his own money and transfers it to himself and his wife as tenants by the entirety, he in effect exercises the right of post mortem disposition and gives his wife the absolute title, contingent upon his death." The Court cannot agree with these last assertions because unable to concede that anything actually devolved from the husband upon the wife at the former's death. In one sense, it is true that upon the husband's death, the wife did acquire more than she had during his life time, namely, complete title in herself as sole owner as opposed to title to the whole jointly with her husband, but this is not tantamount to saying that she acquired this right from her husband. We must not lose sight of the clear object of the Act as the Supreme Court [fol. 19] has construed it, which is to tax the transfer of an estate which passes from the decedent, and is not to tax an estate which simply ceases with his death. As pointed out by the Court of Claims in the Blount case, it

is not logical to contend that this statute imposes a tax on an estate for life, held by a person at the time of his death, on the theory that the tax is upon an interest which ceases by reason of his death. He transfers nothing to the remainder-man, and so it is with respect to a wife's inchoate right of dower which becomes absolute upon her husband's death. By his death nothing is actually transferred to her. The law, itself simply consummates the inchoate right upon the husband's death.

The Court is, therefore, forced to the conclusion that the reasoning in the decision in the Blount case, as well as in the Hibbard and Monroe cases above referred to, is sound in its application to a tenancy by the entireties and therefore, should be followed. In the Nebraska case, an appeal was taken by the Government to the Supreme Court, which, however, was dismissed prior to hearing. The Missouri decision was not appealed.

In a recent decision by the Circuit Court of Appeals for the Ninth Circuit, Carter vs. English, 15 F. (2d) 6, the Court had under consideration this same section of the estate tax act in its application to a joint tenancy created under the law of California. Under that law as construed by the California Courts, just as at common law, the title to joint property under a joint tenancy is held not to pass to and vest in the survivor upon the death of his co-tenant but each tenant is seized of the whole estate from the first. No change occurs in his title on the death of his co-tenant but it simply "remains to him" and comes wholly from the original grant. The Court held that under a provision in a will giving property to testator's widow and daughter as joint tenants, on the death of the widow one-half of such property was not subject to the estate tax, saying, page 7, that to impose such a tax is "inconsistent with the status of the right as defined by the California Court." It is true that the joint tenancy was created before the passage of the Act and on the authority of Shwab vs. Doyle, 258 U. S. 529, the Court declined to give retroactive effect to the Act. However, the conclusions of the Court with respect to the [fol. 20] character of the estate sought to be taxed is very persuasive, even if taken as unnecessary to the decision in the case. The Court concludes its opinion with the fol-

lowing statement, page 8: "Our judgment is that the will gave to each tenant a present joint ownership in the whole property described in the will; *that there was no change of title, and no transfer by reason of the death of Annie Ames.*" (Italics inserted.)

It is to be noted that Section 202 (c) contains a proviso excepting from the operation of the tax such part of the interest included for the purpose of determining the value of the gross estate "as may be shown to have originally belonged *to such other person* and never to have belonged to the deceased." Since as we have seen, the peculiarity of a tenancy by the entireties is that the husband and wife are each seized of the whole estate, it can scarcely be said that this proviso was intended to or does relate to such a tenancy, because the result would be to exclude entirely from this section every tenancy by the entireties. This, the Court feels, is not a reasonable construction to be placed upon this section, in view of the fact that Congress saw fit to include the specific definition of such tenancies. The proviso obviously is intended to, and must relate to joint interests other than tenancies by the entireties as that term is uniformly understood in our law. This is confirmed by the fact that in 1924 this section was amended to read as follows; and has not been changed by an- subsequent amendment: "to the extent of the interest therein held as joint tenants by the decedent and *any other person*, or as tenants by the entirety by the decedent and *spouse*, or deposited with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to *such other person* and never to have been received or acquired by the *latter* from the decedent," etc. (Italics inserted.)

In reaching this conclusion the Court is not unmindful of the elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the Court should adopt the construction which would uphold it, if the statute can be reasonably so construed. Harriman vs. Interstate Commerce Comm. 211 U. S. 407; U. S. vs. Delaware [fol. 21] & Hudson Co., 213 U. S. 366. But a Court is not

at liberty, in order to sustain a statute, to give it a forced construction, or to read into it and to interpolate words which do not appear in the language as enacted. Such the Court feels it would be doing in the present case if it should hold that the proviso in Section 202 (c) vitiates entirely the inclusion of tenancies by the entireties.

The Government in support of the constitutionality of the Act points out that the federal estate tax is not restricted to property which the decedent owned at his death and which is then transferred, and refers to that provision of the law Section 202(b) which taxes transfers made in contemplation of death; that this was done to prevent evasion and to give practical effect to the exercise of admitted power; and that by the same reasoning, if the value of a tenancy by the entireties is not to be treated as part of the estate of the tenant who dies first, then in those states where, as in Maryland, the common law estate of tenancy by the entireties exists as to both real and personal property, a husband and wife may cause all of the-r property to be transferred to themselves as tenants by the entireties and thereby enable the estate of the one dying first completely to escape estate taxes. But this is an argument based rather upon convenience than upon sound legal principles. In judicial interpretation of legislative acts, there is no place for the adage that "the wish is father to the thought." It is true, as the Supreme Court said, in Nichols vs. Coolidge, 274 U. S. 531, at 542, "undoubtedly, Congress may require that property subsequently transferred in contemplation of death, be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity." While from a practical point of view there is force in the Government's argument, in addition to what has already been said, it is sufficient to point that as the statute now stands a person, in his life time, has the absolute right to give any or all of his property away without being subject to the tax, provided such gift be not made in contemplation of, or intended to take effect in possession or enjoyment at or after death, but if the gift be consummated through the creation of a tenancy by the entireties and in fact made with such contemplation or intention, it would be taxable just the same [fol. 22] as though made in any other manner.

It follows that since the effect of Section 202(c) of the Act is to levy a direct tax upon the decedent's estate contrary to Article 1, Sections 2 and 9 of the Constitution, that Section is invalid in so far as it affects a tenancy by the entireties.

We now turn to the second and last constitutional objection, namely, that the tax in so far as it includes tenancies by the entireties, measures the tax upon the decedent's estate by property which belongs to another, namely, the surviving spouse and for this reason is arbitrary and capricious and in violation of the due process clause of the Fifth Amendment to the Constitution. From the conclusions just reached, the Court must hold that this objection is well taken and such being the case, there is ample authority for declaring Section 202(c) invalid on this ground as well as on the ground that it violates the other provisions of the Constitution hereinbefore named relating to direct taxation. As was said by the Supreme Court in Nichols vs. Coolidge, supra, page 542: "This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. Brushaber v. Union Pacific R. R., 240 U. S. 1, 24; Barclay & Co. vs. Edwards, 267 U. S. 442, 450. See also Knowlton v. Moore, 178 U. S. 41, 77."

Verdict will, therefore, be entered for the plaintiffs in the sum of $3,337.67, together with interest at the rate of six percent per annum on said amount, from June 14th, 1921 to the date of judgment.

IN UNITED STATES DISTRICT COURT

VERDICT AND JUDGMENT

Whereupon, the issues joined as aforesaid between the parties aforesaid were tried before the Court without a Jury upon a stipulation of facts agreed upon by counsel, and the Court having considered same, doth find for the plaintiff and assess the damages of said plaintiff to the sum of Three Thousand Three Hundred Thirty seven dollars and sixty-seven cents, with interest at rate of six per cent per annum on said amount from June 14, 1921 to date of Judgment.

[fol. 23] MEMORANDUM

Verdict was rendered in the above entitled case on the 19th day of October, 1928, and Judgment on the 22nd day of October, 1928.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME FOR SIGNING AND FILING BILL OF EXCEPTIONS—Filed November 15, 1928

Ordered, adjudged, and decreed by the United States District Court of the District of Maryland this 15th day of November, 1928, that the time for filing and signing bills of exceptions in the above entitled case be extended until and to include the 14th day of December, nineteen hundred and twenty-eight.

Morris A. Soper, United States District Judge.

[fol. 24] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME FOR SIGNING AND FILING BILL OF EXCEPTIONS—Filed December 13, 1928

Ordered, adjudged, and decreed by the United States District Court of the District of Maryland this 13th day of December, 1928, that the time for filing and signing Bills of Exceptions in the above entitled case be extended until and to include the fourteenth day of January, nineteen hundred and twenty-nine.

William C. Coleman, United States District Judge.

IN UNITED STATES DISTRICT COURT

BILL OF EXCEPTIONS—Filed January 7, 1929.

Be it remembered that the trial of the above entitled case was held on the second day of April, 1928, before the Honorable William C. Coleman, District Judge of the United States District Court for the District of Maryland, without

a jury, at Baltimore, Maryland, and in order to sustain the issue joining, the following stipulation of facts was filed:

[fol. 25] STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true.

1. That the plaintiffs are residents of the State of Maryland and are the duly qualified and acting administrators of the estate of James E. Tyler, deceased.

2. That said James E. Tyler, a resident of the State of Maryland, died at Baltimore in said State on May 7, 1918, intestate.

3. That pursuant to the provisions of the Revenue Act of 1916, as amended, the plaintiffs as said administrators on or about the 12th day of March, 1919 filed with the Collector of Internal Revenue for the District of Maryland a Federal estate tax return for the estate of said James E. Tyler, showing a net estate, for the purpose of the Federal estate tax, of $76,561.24, and a total tax of $2,062.45, which was duly paid by the plaintiffs as said administrators to the said Collector on March 14, 1919.

4. That subsequent to the filing of said return, the Commissioner of Internal Revenue, upon additional facts and information submitted to him, directed a review and audit of said return of the estate of the decedent, and as a result of such review and audit the net estate and taxes due thereon were found and determined to be as follows:

Gross estate	$265,662.30
Deductions	58,207.70
Net estate	$207,454.60
Estate tax	$8,447.28
Estate tax paid	2,062.45
Estate tax due	$6,384.83

[fol. 26] That the plaintiffs as said administrators paid said additional tax in the sum of $6,384.83 to the said Collector in May and June, 1921, together with interest in the sum of $502.65.

5. That in said review and audit the Commissioner of Internal Revenue included in the decedent's gross estate 373 shares of the capital stock of The Kimball, Tyler Company, of a determined value of $63,083.76. Said shares of stock had not been included in the estate tax return filed by the plaintiffs as said administrators.

6. That on or about the 28th day of February, 1924, the plaintiffs as said administrators filed with the said Collector a claim for refund in the sum of $2,076.00, on the ground among others that 24 shares of the capital stock of The Kimball, Tyler Company were improperly included in the gross estate, as said 24 shares had been given by the decedent to his son.

7. That on or about the 15th day of September, 1924, the plaintiffs as said administrators filed with the said Collector a claim for refund in the amount of $4,308.83, on the ground that 348 shares of the capital stock of The Kimball, Tyler Company, were owned by the decedent and his wife as tenants by the entirety, and under the decision in the case of Blount v. United States, (59 Ct. Cls. 328), the value of said shares was not subject to Federal estate tax.

8. That on or about the 4th day of August, 1925, the Commissioner of Internal Revenue allowed said claim for refund for $2,076.00 in the amount of $1,765.62, and rejected said claim for refund in the sum of $310.28, making certain adjustments not material to the issue in this case, and reducing the number of shares of The Kimball, Tyler Company stock to be included in the gross estate from 373 shares to 349 shares of a determined value of $59,183.42, and on the same day the Commissioner of Internal Revenue rejected said claim for refund in the amount of $4,308.83 in its entirety, on the ground that the value of 349 shares of the capital stock of The Kimball, Tyler Company was properly included in the decedent's gross estate; that a check was duly mailed to the plaintiffs as said adminis-

trators for $1,765.72 and $416.86 interest, or a total amount [fol. 27] of $2,182.58.

9. That at the death of the decedent he and his wife, Ida H. Tyler, were the owners of 349 shares of the capital stock of The Kimball, Tyler Company, a West Virginia corporation, doing business in the State of Maryland, the said stock standing on the books of the corporation in the names of "James E. Tyler and Ida H. Tyler as tenants by the entireties," and having been so transferred by the decedent on November 29, 1917. Prior to said transfer the decedent was the sole owner of said stock.

10. That if the value of the said 349 shares of the capital stock of The Kimball, Tyler Company should not properly be included in the decedent's gross estate the plaintiffs as said administrators are entitled to recover in this action the sum of $2,971.76 and interest paid on said amount in the sum of $365.91, or a total amount of $3,337.67, together with interest at the rate of 6% per annum on the amount of $3,337.67 from June 14, 1921, to the date of judgment.

And thereupon no other evidence was offered and the Counsel for the defendant moved the Court as follows:

"Now comes the defendant and moves the Court for Judgment against the Plaintiffs, dismissing the Plaintiffs' petition filed herein and to recover from said plaintiffs the costs herein expended for the reason that there is not sufficient evidence to warrant judgment in favor of the plaintiffs."

Which motion the Court did not grant and to the Court's action in thus rejecting the defendant's motion, the defendant then and there excepted and now prays the Court to sign and seal this its first bill of exceptions.

William C. Coleman, United States District Judge.
(Seal.)

Second Bill of Exceptions

[fol. 28] The evidence and proceedings set forth in the aforegoing Bill of Exceptions which are herewith by refer-

ence incorporated as a part of this Bill of Exceptions as herein set forth at length, having been heard and the defendant offered the following request for findings of fact and conclusions of law:

"Now comes the defendant by its attorney, Amos W. W. Woodcock, United States Attorney, and requests the Court specifically to find the facts in this case as follows:

That the decedent and his wife, Ida H. Tyler, at the date of the decedent's death on May 7, 1918, were the owners of 349 shares of stock in The Kimball, Tyler Company standing on the books of the corporation in the names of 'James E. Tyler and Ida H. Tyder as tenants by the entirely', such stock having been so transferred by the decedent on November 29, 1917. Prior to said transfer the decedent was the sole owner of said stock. The defendant requests the Court to find as a matter of law that the whole value of the said 349 shares of stock in The Kimball, Tyler Company was properly included in the decedent's gross estate under the provisions of Section 202 (c) of the Revenue Act of 1916, as amended."

which the Court did not grant. To the refusal of the Court to grant the above request, the defendant then and there excepted and prays the Court to sign and seal its Second Bill of Exceptions.

William C. Coleman, United States District Judge.
(Seal.)

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed January 7, 1929

Now comes he Appellant, the United States of America, by A. W. W. Woodcock, United States Attorney, and in connection with its appeal assigns that in the record proceedings and judgment aforesaid, manifest error has [fol. 29] intervened to the prejudice of the Appellant, to wit:

1. That the Court erred in ordering judgment in the sum of $3,337.67 to be entered in favor of the plaintiff in this Court and against the defendant.

2. That the Court erred in refusing to enter a judgment in favor of the defendant in this Court and against the plaintiffs in this Court.

3. That the Court erred in its opinion filed in this case on the nineteenth day of October, 1928, in ruling "It follows that since the effect of Section 202-C of the Revenue Act of September 8, 1916, is to levy a direct tax upon the decedent's estate contrary to Article I Sections 2 and 9 of the Constitution, that section is invalid in so far as it effects the tenancy by the entireties."

4. That the Court erred in ruling in the same charge that the said section of the law is invalid in so far as it includes tenancies by the entireties in that the section is arbitrary and capricious and in violation of the Fifth Amendment of the Constitution of the United States.

5. That the Court erred in ruling that the 349 shares of the capital stock of the Kimball-Tyler Company, a West Virginia corporation, of a determined value of $59,183.42, were unlawfully included in the gross estate of James E. Tyler, deceased, for the purposes of the Federal Estate Tax.

6. The Court erred in refusing especially to grant the defendant's formal motion for judgment.

7. The Court erred in refusing to grant the defendant's formal request for findings of fact and conclusions of law.

By reason whereof, the Appellant prays that the aforesaid judgment may be reversed.

A. W. W. Woodcock, United States Attorney.

[fol. 30] In United States District Court

Stipulation re Transcript of Record—Filed January 14, 1929

It is stipulated and agreed by the parties to this cause that the transcript of record of the appeal in the above entitled case to the United States Circuit Court of Appeals for the Fourth Circuit shall consist of the following:

1. Declaration

2. Pleas
3. Verdict and Judgment
4. Opinion of the Court
5. Petition and Order extending the time for filing Bills of Exception
6. Petition and Order extending the time for filing Bills of Exception
7. Defendant's Assignment of Errors
8. Defendant's Bills of Exception
9. Stipulation of Counsel as to making up record of appeal
10. Memorandum of the Clerk
11. Order of transfer record
12. Clerk's certificate

And it is further stipulated and agreed that the Clerk of this Court shall make a transcript of the record of this [fols. 31 & 32] case and transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, to be printed in accordance with Rule 23 of the said Court.

J. Edward Tyler, Jr., Attorneys for the Plaintiff.
A. W. W. Woodcock, Attorney for the Defendant.

IN UNITED STATES DISTRICT COURT

MEMORANDUM RE APPEAL PAPERS

(1) Petition for Appeal, filed 7th January, 1929.

(2) Appeal granted, 7th January, 1929.

(3) Citation dated 7th January, 1929. (Service acknowledged 10th January, 1929.)

IN UNITED STATES DISTRICT COURT

ORDER TO TRANSMIT RECORD

And, thereupon, it is ordered by the Court here that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be trans-

mitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Teste: Arthur L. Spamer, Clerk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 33] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 2840

UNITED STATES OF AMERICA, Appellant,

versus

JAMES E. TYLER, JR. and WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased, Appellees

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

MINUTE ENTRIES

January 16, 1929, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of A. W. W. Woodcock, U. S. Attorney, and Eldon O. Hanson, Special Attorney, Bureau of Internal Revenue, is entered for the appellant.

January 26, 1929, the appearance of J. Edward Tyler, Jr., Frank S. Bright, and L. C. Connally is entered for the appellees.

[fol. 34] February 18, 1929, twenty-five copies of the printed record are filed.

Argument of Cause

April 23, 1929 (April term, 1929), cause came on to be heard before Waddill, Parker and Norcott, Circuit Judges, and is argued by counsel and submitted.

[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 2840

UNITED STATES OF AMERICA, Appellant,

versus

JAMES E. TYLER, JR., and WILLIAM G. TYLER, Administrators of the Estate of James E. Tyler, Deceased, Appellees

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

(Argued April 23, 1929. Decided July 1, 1929)

Before Waddill, Parker, and Northcott, Circuit Judges

OPINION—Filed July 1, 1929

[fol. 36] PARKER, Circuit Judge:

This is an appeal from a verdict and judgment rendered in favor of the administrators of James E. Tyler, deceased, who paid under protest a portion of the federal estate tax assessed against the estate which came into their hands and instituted suit to recover it back as allowed by statute. The portion of the tax disputed is that assessed against the estate because of including in the value thereof property which was held by decedent and his wife as tenants by the entireties, and which upon the death of decedent vested in the wife as sole and exclusive owner. The facts in the case are few and undisputed. In November 1917 decedent transferred 349 shares of stock in the Kimball-Tyler Company to himself and wife, creating therein under the laws of Maryland an estate by the entireties in their favor. On his death in 1918, his wife became vested under the Maryland law with the sole ownership of the shares of stock. The value of the stock was $59,193.42 and it was included for taxation as a part of the gross estate of decedent, the total of which was $207,454.60. The estate tax was increased by reason of its inclusion in the amount of $3,337.67.

The administrators contended that estates by the entireties were not embraced within the terms of the taxing stat-

ute, and also that, if the statute should be construed as embracing them, it would be void as violative of the provisions of the Constitution which require the apportionment of direct taxes and of the due process clause of the Fifth Amendment. The learned District Judge held that the terms of the statute required the inclusion of estates by entireties in the determination of the gross estate for the purposes of taxation, but that in so far as it did this it violated the provisions of the Constitution upon which the administrators relied.

We think that the learned Judge was correct in holding [fol. 37] that estates by the entireties were embraced within the terms of the taxing statute. See Revenue Act of 1916. 39 Stat. 756, 778. Section 201 of that act provided that a tax according to a graduated scale should be imposed upon the transfer of the net estate of every decedent dying after its passage, and that the value of the net estate should be determined as provided in Section 203. The latter section provided for the deduction of an exemption of $50,000 and certain other items from the value of the "gross estate." And Section 202 provided that the value of the "gross estate" should be determined by including the value at the time of the death of decedent of all property, real or personal, tangible or intangible, (a) to the extent of his interest therein at the time, (b) to the extent of any interest which he had transferred in contemplation of death, (c) and to the extent of the interest held jointly or as tenant by the entireties with another, the exact wording of clause c of Section 202 being as follows:

"(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

The administrators rely upon the decision of the Board of Tax Appeals in the Appeal of Susie M. Root, 5 B. T. A. 696, and certain expressions in the opinion of the Court of Claims in Blount v. U. S. 59 Court of Claims 328, for the position that, as Section 201 of the statute imposes the tax upon transfers of the net estate, and as an estate by en-

tireties is not transferred to the surviving spouse, there was no intention to tax such an estate, and that the language in the statute must be held to be confined to joint tenancies. The answer to this, however, is that in Section [fol. 38] 201 the tax is imposed upon the transfer of the net estate as determined under subsequent provisions, and subsequent provisions require that estates by the entireties be included. The word "entirety" as applied to estates has had for centuries a well understood meaning in the law; and we must assume that Congress employed the language which it did in the light of that meaning. We attach no importance to the fact that the statute uses the language "tenants in the entirety" instead of the customary "tenants by the entirety." The same language appears in the Act of 1921, 42 Stat. 278, and it is worthy of note that it is referred to in the opinion of the Supreme Court in Reinecke v. Northern Trust Co. 278 U. S. 339, 49 Sup. Ct. 123, 126 as embracing an estate "by the entirety."

While it is true that an estate by entireties is vested in husband and wife at the time of the conveyance to them and that technically there is no transfer to the survivor when one of them dies, nevertheless, as a practical matter, there is a transfer to the survivor of all the rights which the decedent had in the estate, and Congress no doubt had this in mind in requiring estates by entireties to be included with the other property of decedent in determining the taxable value of his estate. Whether the vesting of the entire estate in the survivor be technically a transfer or not, Congress clearly intended that it should be treated as a transfer for the purpose of estate taxation. Joint tenancies and gifts made in contemplation of death were included. Why omit estates under which property could be jointly enjoyed by a man and his wife during their joint lives and, upon the death of one, inure to the sole benefit of the survivor? It is not reasonable to assume that, after being so careful about other matters, Congress would have left open so wide an avenue for evasion of the tax. We feel certain that it has not done so when the language used is given its reasonable interpretation.

[fol. 39] As the language of the act, therefore, requires that the value of estates by the entireties be included in the valuation of estates for the purpose of taxation, the only question that remains to be decided is whether Congress

had the power to make such requirement. We think that it had. No question is raised as to the general power of Congress under the Constitution to levy an estate tax, and none can be raised. Such a tax is not a direct tax requiring apportionment, but falls within the classification of "imposts, duties and excises" which Congress is authorized to levy by Section 8, Clause 1, of Article 1 of that instrument. Scholey v. Rew 23 Wall. 331; Magoun v. Illinois Trust etc. Bank 170 U. S. 283, 287; Knowlton v. Moore 178 U. S. 41; New York Trust Co. v. Eisner 256 U. S. 345; Chase Nat. Bank v. U. S. 278 U. S. 327, 49 Sup. Ct. 126. It is imposed, not on property, but on the privilege of transferring it, and is measured by the value of the interest transferred or which ceases at death. Y. M. C. A. v. Davis 264 U. S. 47; Chase Nat. Bank v. U. S., supra.

The statute, in so far as it requires the inclusion of estates by entireties in the valuation of the estates of decedents for purposes of estate taxation, is said to violate the Constitution because it is contended that in the case of an estate by the entireties there is no transfer to the survivor and consequently no basis for the imposition of an estate tax, and from this it is argued that the tax must be considered as a direct tax upon the property itself. We think, however, that this gives too narrow a meaning to "transfer" and ascribes too much importance to what are pure fictions of the law. It is true that husband and wife are said to be seized of the estate by entireties "per tout et non per my," that is to say, each during their joint lives is deemed seized of the whole estate and not of a moiety thereof; and it is true that, upon the death of one, the survivor is said to take no new interest because originally [fol. 40] vested with the entirety. But these doctrines are pure fictions based upon the fiction of the unity of husband and wife. Marburg v. Cole 49 Md. 402, 33 Am. Rep. 266; Ades v. Caplan 132 Md. 66, L. R. A. 1918D, 276. As a matter of fact, husband and wife are not one person but two persons, and neither has absolute right in or control over the property so long as the other lives. Only upon the death of one does the other acquire absolute ownership with the right to sole and unrestricted use and possession and the right to alien and convey. Whatever form of technical

expression be used, therefore, and whatever sophistries indulged, the fact remains that, upon the death of one of the parties, the survivor by operation of law succeeds to the interest which the decedent had in the property. As said by the Court of Appeals of Maryland in Brewer v. Bowersox 92 Md. 567, 572, 573, 48 Atl. 1060, 1062, "The right of survivorship, which is one of its chief incidents, cannot be destroyed except by the joint act of the two; and upon the death of either the other *succeeds* to the entire property or fund." (Italics ours). It is the transfer of interest involved in this "succession" which is the basis of taxation under the statute.

We see no reason why the casting of the entire estate upon the survivor, which takes place by operation of law in case of the death of one of the tenants by entireties, cannot be made the basis of taxation as well as the casting of succession upon the heir, which takes place in the case of intestate succession. The surviving spouse receives an enlargement of his interest in the property in the one case just as the heir receives an interest in the property in the other; and in both cases it comes by operation of law. As stated above, it is no answer to say that because of the unity of husband and wife the survivor has, after the death of the other, what he has always had; for, as we have seen, the interest of the deceased spouse, from a practical standpoint, has been vested by law in the survivor. So long as [fol. 41] both are living, neither can convey the property without the joinder of the other. Neither is entitled to use and enjoy it to the exclusion of the other. Neither has any right in it beyond his own life unless he survives the other. If the parties should be divorced, the estate would be dissolved, and neither would succeed to the whole property even if he should survive. Upon the death of one of the parties, however, all of his rights in the property are by operation of law transferred to the other so as to create a sole and unconditional estate therein. To deny that there is a transfer of property in such case resulting from death, is to lose the substance of legal rights while grasping at the shadow.

What we have said answers the contention that the statutory provision violates the due process clause of the Fifth Amendment. This contention is based upon the theory that the statute, in so far as it includes tenancies by the entire-

ties, measures the tax upon decedent's estate by property which belongs to another. But, as we have seen, the property does not belong to the other in the sense of his having unconditional and sole ownership thereof until the death of decedent.

In the recent case of Chase Nat. Bank v. U. S., supra, the Supreme Court considered whether it was proper to include insurance policies within the taxable estate as required by the statute. The contention was made there, as here, that the interest of the beneficiary had vested prior to the death of insured and that consequently there was no transfer to be taxed, but the Court held that the policies should be included. The question in the case was stated as follows:

"It is true, as emphasized by plaintiff, that the interest of the beneficiaries in the insurance policies effected by decedent 'vested' in them before his death and that the proceeds of the policies came to the beneficiaries, not directly from the decedent, but from the insurer. But until the moment of death the decedent retained a legal interest in [fol. 42] the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled."

And, answering the question thus propounded, the Court said:

"Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that shifting of the economic benefits of property which is the real subject of the tax, just as effectively as would its exercise, which latter may be subjected to a privilege tax."

There can be no question in this case that we have the termination of the power of decedent over the property, and that this inures to the benefit of the surviving spouse,

whose ownership prior to the death of decedent was subject to the rights of decedent therein. And there can be no question, also, that we have a "shifting of the economic benefits of property which is the real subject of the tax". As said in Nichols v. Coolidge, 274 U. S. 531, 541, "Taxes are very real things and statutes imposing them are to be estimated by practical results."

We have carefully considered the cases which have reached a different conclusion, but, with great respect to the tribunals which rendered them, we do not think that they are sound. We have likewise considered the District Court cases relating to the validity of the statute requiring that the value of the widow's dower be included in the value of the estate for the purpose of taxation. Without passing [fols. 43 & 44] upon that question, which is not before us, it is worthy of note that the Circuit Court of Appeals of the Eighth Circuit has decided that the value of dower allotted under the Nebraska statute should be included in the valuation of the estate. Allen, Collector, v. Henggeler (C. C. A. 8th) 32 Fed. (2d) 69.

For the reasons stated, we think that the learned Judge below erred in holding that the provision of the statute in question was violative of the Constitution. The judgment in favor of the administrators will accordingly be reversed and the case will be remanded for further proceedings not inconsistent with this opinion.

Reversed.

[fol. 45] In United States Circuit Court of Appeals, Fourth Circuit

No. 2840

United States of America, Appellant,

vs.

James E. Tyler, Jr., and William G. Tyler, Administrators of the Estate of James E. Tyler, Deceased, Appellees

Appeal from the District Court of the United States for the District of Maryland

Judgment—Filed and Entered July 6, 1929

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the District Court of the United States for the District of Maryland, at Baltimore, with directions to set aside the verdict and grant a new trial in accordance with the opinion of the Court filed herein.

July 6th, 1929.

John J. Parker, U. S. Circuit Judge.

[fol. 46] In United States Circuit Court of Appeals

Minute Entries

On another day, to-wit, August 6, 1929, the mandate of this Court in this cause is issued and transmitted to the United States District Court at Baltimore, Maryland, in due form.

Same day, the original petition for appeal, and order allowing appeal are returned to the Clerk of the District Court at Baltimore, Maryland.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] Supreme Court of the United States

Order Allowing Certiorari—Filed November 25, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,559. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 428. James E. Tyler, Jr., and William G. Tyler, administrators of the estate of James E. Tyler, petitioners, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed October 4, 1929. File No. 34,559.